

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNA R. ROBINSON and DEPARTMENT OF THE NAVY,
NAVAL SUBMARINE BASE BANGOR, Silverdale, WA

*Docket No. 02-1311; Submitted on the Record;
Issued January 10, 2003*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits based on her ability to perform the selected position of office helper.

On August 7, 1995 appellant, then a 39-year-old child development program assistant, filed a claim for a traumatic injury occurring on that date when she fell in the performance of duty. The Office accepted appellant's claim for left shoulder and hip contusions, bursitis of the left hip and impingement syndrome of the left shoulder. The Office further accepted that appellant sustained a hip strain on December 11, 1996. Appellant returned to part-time limited-duty employment with the employing establishment until March 27, 1998. The Office placed appellant on the periodic rolls effective March 29, 1998.

On February 20, 1998 the Office referred appellant to a rehabilitation counselor for vocational rehabilitation. Based on the recommendation of the rehabilitation counselor, the Office approved a training program for appellant as a general office clerk. Appellant began taking courses in basic skills and office skills at a local college with a goal of obtaining a General Office certificate. Appellant also began on-the-job training.¹

In a report dated March 24, 1999, Dr. James M. Russo, a Board-certified orthopedic surgeon and second opinion examiner, reviewed the evidence of record and listed detailed findings on physical examination. He diagnosed preexisting facet arthritis of the lumbar spine which he found aggravated by appellant's work injury but asymptomatic. Dr. Russo further diagnosed a hip contusion, shoulder strain, status post acromioplasty of the left shoulder, chronic myofascial pain and a probable reactive depression. He found that appellant did not have "an ongoing active impingement of the left shoulder or bursitis of the left hip. I believe she does

¹ Appellant subsequently stopped her on-the-job training program to concentrate on school based on the advice of her physician.

have myofascial pain complaints that are somewhat more difficult to understand and I do believe there is an element of symptoms magnification.” Dr. Russo reviewed enclosed job descriptions and opined that appellant could perform the full-time position of office helper, telephone solicitor and cashier but could not perform the position of daycare worker because of the amount of overhead work.

Appellant underwent a functional capacity evaluation on May 12, 1999. In a medical report dated April 20, 2000, Dr. Guy H. Earle, Board-certified in family practice and appellant’s attending physician, diagnosed impingement syndrome of the left shoulder without pain but with limited mobility above the shoulder. He further diagnosed “mild tenderness over the left greater trochanter” of her hip. He stated:

“The shoulder and hip problem[s] are directly related to her fall, which was the occupational injury. The mood and sleep alterations are a consequence of the chronic pain and loss of function. [Appellant] is currently actively participating in her vocational retraining program. A PCE [physical capacity evaluation] is completed as per your request. Please note that this is based on the results of a May 12, 1999 performance-based PCE.”

In a work restriction evaluation dated April 20, 2000, Dr. Earle, in response to the question of whether there was a reason that appellant could not work eight hours per day answered “yes -- attending school.” He listed her limitations as sitting 4 to 6 hours, walking 2 hours, standing 3 to 4 hours, no reaching over the shoulder, occasional twisting, occasional pushing and pulling up to 8 pounds, occasional lifting of 15 to 20 pounds, occasional squatting and kneeling and seldom to occasional climbing.

In a report dated July 27, 2000, the rehabilitation counselor noted that appellant’s status had changed from training to placement with a new employer. She noted that appellant would not obtain her certificate in general office skills in June 2000 but that the certificate was not required in order for appellant to obtain employment.² She stated that appellant had the job skills necessary to work in the position of file clerk, receptionist or office assistant/helper. The rehabilitation counselor enclosed a labor market survey dated March 20, 2000 for the positions of office helper and file clerk. She opined that the position of office helper was reasonably available in appellant’s commuting area and that “she should have very little difficulty finding employment.”

In a job classification dated January 15, 2000, the rehabilitation counselor reviewed the position of office helper and opined that appellant had the vocational preparation to obtain employment through her training. The rehabilitation counselor noted that appellant had worked as a library clerk for three months and as an office helper for two months. She further noted that appellant received two years of clerical and computer training at a local college.

By decision dated January 5, 2001, the Office reduced appellant’s compensation effective January 13, 2001 based on its finding that she had the wage-earning capacity to perform the position of office helper. However, in a decision dated April 24, 2001, a hearing representative

² Appellant did not take sufficient credits each semester to timely complete her certificate.

vacated the Office's January 5, 2001 decision on the grounds that appellant had not received pretermination notice.

On July 6, 2001 the Office issued a proposed notice of reduction of compensation based on appellant's ability to perform the position of office helper. In another letter of the same date, the Office referred appellant for a second opinion examination.

By decision dated August 13, 2001, the Office finalized its reduction of appellant's compensation effective August 12, 2001.

Appellant requested a hearing, which was held on January 8, 2002. In a decision dated March 11, 2002, the hearing representative affirmed the Office's August 13, 2001 wage-earning capacity decision.³

The Board finds that the Office properly reduced appellant's compensation benefits based on her ability to perform the selected position of office helper.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.⁴ Under section 8115(a) of the Federal Employees' Compensation Act,⁵ wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications, and the availability of suitable employment.⁶

After the Office makes a medical determination of partial disability and of special work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position listed in the Department of Labor, *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment services or other applicable services. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.⁷

³ The hearing representative noted that the report of the second opinion evaluation scheduled by the Office in its letter of July 6, 2001 was not in the record.

⁴ *David W. Green*, 43 ECAB 883 (1992); *Harold S. McGough*, 36 ECAB 332 (1984).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Samuel J. Chavez*, 44 ECAB 431 (1993).

⁷ *Albert C. Shadrick*, 5 ECAB 376 (1953).

In this case, the medical evidence of record supports a finding that appellant was not totally disabled. In a report dated March 24, 1999, Dr. Russo, a Board-certified orthopedic surgeon and second opinion physician, opined that appellant could perform the position of office assistant. In a work restriction evaluation dated April 20, 2000, Dr. Earle, who is Board-certified in family practice and appellant's attending physician, found that she could sit for 4 to 6 hours per day, stand 3 to 4 hours, walk 2 hours, occasionally push and pull up to 8 pounds, occasionally lift 15 to 20 pounds, occasionally squat and kneel and never reach over her shoulder. While Dr. Earle indicated that appellant could not work eight hours per day, he provided as his rationale the fact that she was "attending school" rather than due to a physical limitation from her employment injury. As the job classification for the position of office helper is "light" with occasional lifting under 20 pounds, the medical evidence supports a finding that appellant has the physical capacities to perform the duties of the position.

As discussed above, however, in assessing the claimant's ability to perform the selected position, the Office must consider not only physical limitations but also take into account his work experience, age, mental capacity and educational background. In this case, the rehabilitation counselor found that appellant had the skills necessary to perform the position of office helper based on her two years of training at a local college. She further found that the position was reasonably available in appellant's commuting area with wages of \$359.60 per week. The Board finds that the Office considered the proper factors, such as availability of suitable employment, appellant's physical limitations and employment qualifications, in determining that the position of office helper represented appellant's wage-earning capacity. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and training to perform the position and that such a position was reasonably available within the general labor market of appellant's commuting area. The Office further properly determined appellant's loss of wage-earning capacity in accordance with the formula developed in *Albert C. Shadrick*⁸ and codified at 20 C.F.R. § 10.403. Therefore, the Office properly determined that the position of office helper reflected appellant's wage-earning capacity effective August 12, 2001.

⁸ *Id.*

The decisions of the Office of Workers' Compensation Programs dated March 11, 2002 and August 13, 2001 are affirmed.

Dated, Washington, DC
January 10, 2003

Michael J. Walsh
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member